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No. 85-691

In the Supreme Court of the United States

OCTOBER TERM, 1985

CECIL LEON RAMSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, who was convicted of destroying a building, contends: (1) that he should have been granted a new trial because a witness who testified that petitioner hired him to burn down the building subsequently recanted; (2) that he was denied a fair trial because a juror failed to disclose that she was related to a policeman; and (3) that he was improperly convicted under 18 U.S.C. 844 because, prior to its amendment in 1982, that statute did not prohibit the burning of a building.

1. Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of malicious destruction of a building by means of an explosive and conspiring to do so, in violation of 18

U.S.C. 371, 844(i), and 2. He was sentenced to two consecutive five-year terms of imprisonment. The court of appeals affirmed (Pet. App. C1-C9).[1]

a. The evidence at trial showed that in the summer of 1981 petitioner hired Floyd Jackson to break into and destroy a grocery store in Wagoner County, Oklahoma. Jackson, testifying for the prosecution, stated that petitioner instructed him to break into the store around midnight and suggested that he use gasoline to destroy the building. The next night, Jackson and two confederates—Tommy Rockwell and Randall Johnson—broke into the store and poured gasoline throughout it.[2] The gasoline ignited before they intended, killing Rockwell, injuring Jackson and Johnson, and destroying the store. 726 F.2d 601, 603 (1984). Jackson also testified that, before the trial, he told petitioner's son that petitioner had nothing to do with the fire. Defense counsel cross-examined Jackson on this issue. Pet. App. B4.

b. After the trial, Jackson executed an affidavit recanting his trial testimony. Jackson stated that he burned down the store on his own because petitioner owed him money and he mistakenly believed that petitioner owned the store, although in fact petitioner's girlfriend owned the store. The district court denied petitioner's motion for a new trial based on Jackson's recantation without a hearing. 726 F.2d at 604.

The Tenth Circuit then issued its first opinion in this case. It first rejected petitioner's argument that gasoline is not an explosive within the meaning of 18 U.S.C. 844 on the basis of *United States* v. *Bunney*, 705 F.2d 378 (10th Cir. 1983). 726 F.2d at 603. It also rejected petitioner's

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[1] The court of appeals issued two opinions in this case, but petitioner included only the second opinion in his petition. The court of appeals' first decision is reported at 726 F.2d 601 (1984).

[2] Johnson corroborated Jackson's testimony that petitioner paid Jackson to burn down the store (Pet. App. B4).

claim that the district court erred by refusing to interview a juror, Darlene Factor, after the trial. Petitioner claimed that Factor should have responded that she was the sister-in-law of a policeman when asked during voir dire whether anyone in her immediate family was connected with law enforcement. The court of appeals noted that the district court had offered to question Factor before the jury began deliberations, when she could have been replaced by another juror, but defense counsel refused that offer. The court held that petitioner had waived his right to complain about Factor by refusing that offer. *Id.* at 603-604. But the court of appeals remanded the case to the district court for a hearing on whether Jackson's recantation constituted newly discovered evidence that warranted a new trial. *Id.* at 604-605.

c. At the hearing on remand, Jackson testified that his affidavit recanting his trial testimony was "not true" and that "his trial testimony was true and correct" (Pet. App. B3). He explained that he had executed the affidavit because "he was scared of what [petitioner] might do" (*ibid.*). Jackson again testified that, prior to trial, he had falsely told petitioner's son that petitioner had nothing to do with the fire, and Jackson's confederate Johnson "again corroborated Jackson's trial testimony of [petitioner's] paying Jackson to burn the store" (Pet. App. B4). The district court then denied petitioner's motion for a new trial. It found that Jackson's pretrial statements exonerating petitioner were known to the defense at trial, were in fact used to cross-examine Jackson, and therefore his recantation did not constitute newly discovered evidence. The court found further that Jackson's affidavit was "false with respect to the differences between it and Jackson's trial testimony" and that "the jury previously has heard these allegations and determined Jackson's credibility thereon" (*id.* at B5).

The court of appeals affirmed (Pet. App. C1-C9). It acknowledged that "[o]n the cold record" it is impossible to determine which of Jackson stories is true (Pet. App. C6). However, the district court, which "took the evidence and personally observed the witness as he testified," was in a much better position to judge Jackson's testimony (*ibid.*). Accordingly, the court held that "[t]he district court's determination that there was no valid recantation but merely another flip-flop by the witness adequately justifies a finding that there was no newly discovered evidence justifying a new trial" (*id.* at C7).

2. a. Petitioner contends (Pet. 20-23) that he is entitled to a new trial on the basis of Jackson's recantation. This factbound claim was correctly decided below. At the hearing on this issue, Jackson repudiated his recantation and reaffirmed the accuracy of his trial testimony, and his accomplice Johnson again corroborated Jackson's trial testimony. Furthermore, as the courts below noted, Jackson's pretrial statements exonerating petitioner were used to impeach him at trial. In these circumstances, the findings of the district court and the court of appeals that the recantation does not require a new trial do not warrant review by this Court.[3]

b. Petitioner's claim (Pet. 23-25) that the trial court erred by failing to inquire whether juror Darlene Factor had failed to disclose on voir dire that she was related to a law enforcement officer lacks merit. As the court of appeals correctly observed, petitioner waived this issue by refusing the district court's offer to interview Factor prior to jury deliberations. By so doing, petitioner relinquished

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[3] Petitioner's observation (Pet. 13) that he has filed another motion for a new trial based upon new recantations by Jackson and Johnson obviously does not provide any basis for this Court to review the district court's denial of the motion for a new trial that the court of appeals affirmed in the judgments presented for review by the petition for a writ of certiorari.

an opportunity to establish a factual predicate for this claim and prevented the district court from removing Factor from the jury at a time when any problem that existed could have been seasonably cured. In these circumstances, review by this Court is unwarranted.

c. Finally, the court of appeals correctly rejected petitioner's argument (Pet. 14-20) that gasoline is not an explosive within the meaning of 18 U.S.C. (1976 ed.) 844(j).[4] This issue is of little continuing importance, because Congress has amended Section 844 in the Anti-Arson Act of 1982 to make clear that anyone who destroys a building "by means of fire" or by means of an explosive device is subject to federal prosecution (Pub. L. No. 97-298, § 2(a), 96 Stat. 1319). That legislation applies to all conduct occurring after October 12, 1982. Petitioner nevertheless contends that this Court should resolve the difference of opinion among the circuits concerning the construction of the term explosives as used in Section 844 prior to its amendment in 1982. This Court recently has denied petitions raising substantially the same claim in *Lee* v. *United States*, No. 83-6457 (June 18, 1984); *Avery* v. *United States*, No. 83-1419 (Mar. 26, 1984); *Morrow* v. *United States*, 464 U.S. 1069 (1984); and *Xheka* v. *United States*, 464 U.S. 993 (1983). There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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[4] Expert testimony presented at trial established that, because of the way in which the gasoline was used to destroy the store, it acted as an explosive device (Tr. 157, 679-687). Other evidence established that there was in fact an explosion (Tr. 68, 72, 129).

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